Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JESSE HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prosecution for contempt of court under 18 U.S.C. § 401(3) can be based upon a standing rule or local rule of the district court or does the word "rule" contained in 18 U.S.C. § 401(3) apply only to a rule to show cause or similar court order?

2. Whether the imposition of a six month period of confinement, probated for three years, and a non-probated fine in the amount of $15,000.00 constitute an illegal, statutorily unauthorized punishment for contempt of court under 18 U.S.C. § 401, which expressly authorizes only the imposition of either a fine or incarceration, but not both, and if so, whether the imposition of an illegal sentence constitutes plain error under Rule 52(b), F.R.C.P., where it was not brought to the court's attention at the time of sentencing?

3. Whether the imposition of a fine on Petitioner and Petitioner's alter-ego, his law firm, for violations of counts 1 and 2 constituted multiple punishment for the same offense, in violation of the Double Jeopardy Clause of the Fifth Amendment, and if so, whether a violation of the multiple punishment prong of the Double Jeopardy Clause constitutes plain error under Rule 52(b), F.R.C.P.?

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PETITION FOR A WRIT OF CERTIORARI

Counsel, on behalf of Petitioner Jesse Herrera, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The unpublished opinion of the court of appeals is contained at Appendix A. The denial of rehearing and suggestion for rehearing en banc is contained in Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2001. (App. A-1, *infra*) The petition for rehearing and suggestion for rehearing *en banc* were denied on May 7, 2001. (App. B-1, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . "

18 U.S.C. § 401 provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobededience or resistence to its lawful writ, process, order, rule, decree or command."

18 U.S.C. § 3563(b) provides:

> "(b) Discretionary conditions – The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3555(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant –
>
> * * *
>
> (22) satisfy such other conditions as the court may impose."

Rule 52(b), Fed.R.Crim.P., provides:

> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

Petitioner was indicted in two counts (of a five count information) for violations of 18 U.S.C. § 401(3), as follows:

> **Count 1** – From January 12, 1998 to on or about March 31, 1998, Petitioner, his associate (Eli Salinas), and Petitioner's law firm (the Herrera Law Firm) willfully disobeyed the lawful order and command of the district court by practicing law without authorization in violation of the Code of Professional Conduct for the State of Texas and the Local Rules of the district court, all in violation of 18 U.S.C. § 401(3). *See* 1R86.
>
> **Count 2** – From January 12, 1998 to on or about June 1, 1998, Petitioner, Salinas, and the Herrera Law Firm wilfully disobeyed an order of the district court by continuing to represent a defendant indicted in federal court (Gonzalez) after being ordered not to do so by the United States Magistrate Judge, in violation of 18 U.S.C. § 401(3). 1R90.

The district court denied the Petitioner's conditional motion for a jury trial, because it indicated that it would not hand down a sentence of imprisonment of more than six months.

On July 30, 1999, Petitioner, his law firm, and Eli Salinas were tried together in district court. The evidence reflected the following chronological sequence of events:

> **February 4, 1998** – A detention hearing for Nelson Gonzalez was held in which United States Magistrate Judge Stuart Platt heard testimony from Sgt. Ronnie Bryant that Nelson Gonzalez had been involved in an Odessa,

Texas, shooting and that the investigator for Petitioner had made calls to the state district attorney and an assistant district attorney which the latter interpreted as conveying a threat if she did not drop the charges to a misdemeanor.

February 11, 1998 – A Motion to Substitute Counsel, signed by Petitioner, was filed on behalf of The Herrera Law Firm. 2R58 (Gov. Exh. 3). Tony Chavez was representing Gonzalez as of the date of the filing of that motion to substitute.

End of February but prior to February 24, 1998 – Magistrate Judge Stuart Platt's office (not Platt himself) received four phone calls from Petitioner and/or Eli Salinas, protesting the examination of Nelson Gonzalez at the Mayo Clinic in the Bureau of Prisons. 2R54-55, 2R61.

February 20, 1998 – Last date alleged by Salinas in his affidavit of July 7, 1998, *infra*, to reflect work done by Petitioner on Nelson Gonzalez' case. Govt. Exh. 8.

February 24, 1998 – Entry of Appearance on behalf of Nelson Gonzalez was filed by Eli Salinas.

February 24, 1998 – Magistrate Judge Platt signed an Order Denying Motion to Substitute Counsel (apparently responding to Petitioner's February 11th motion, but *conditionally* denying *Petitioner's* "**entry of appearance**" for Gonzalez, which really corresponded to *Salinas'* entry of appearance of February 24, 1998). Gov. Exh. 5.

February 26, 1998 – Magistrate Judge Platt's Order Denying Motion to Substitute Counsel was filed. Gov. Exh. 5.

March 1, 1998 – At or around this date, James Hershberger, an attorney in Midland, Texas, was asked by the investigator for the Herrera Law Firm to help in the representation of Nelson Gonzalez. 2R19-20; Gov. Exh. 9.

March 3, 1998 – Motion to Withdraw as Attorney of Record was filed by Tony Chavez. Gov. Exh. 4.

March 31, 1998 – Order Denying Entry of Appearance was filed. Magistrate Judge Platt enters another order barring the Herrera Law Firm from representing Gonzalez because of a conflict of interest he had first perceived in the February 4 detention hearing. Gov. Exh. 5. The order allowed the Herrera Firm a "show cause" hearing in order to disprove the alleged conflict of interest. 2R64.

March 31, 1998 – Magistrate Judge Platt grants Tony Chavez' motion to withdraw as counsel to Gonzalez. 2R64.

March 31, 1998 – The date after which Assistant United States Attorney Glenn Jackson had no contact with Petitioner. 2R16.

Early May 1998 – Assistant United States Attorney Jackson met with Steve Hershberger during a detention hearing for Nelson Gonzalez. 2R13, 2R24.

May 12, 1998 – The date on which the government alleged that Hershberger's affidavit specifically stated that Hershberger sent a letter to Petitioner concerning Gonzalez's case status. Govt. Exh. 9.

May 12, 1998 – Hershberger and Salinas meet with Nelson Gonzalez for two and a half hours. 2R37.

May 20, 1998 – The federal indictment against Nelson Gonzalez is unsealed. 2R38, 47.

June 10, 1998 – Order Granting Defendant, Nelson Agustin Gonzalez's Motion to Substitute Counsel is filed, recognizing Michael McLeaish as counsel of record. Gov. Exh. 7.

Early June 1998 – Mike McLeaish informed Hershberger that the Gonzalez family had hired McLeaish.

June 29, 1998 – Attorney Fee Hearing held where Gonzalez sought return of $10,000 from The Herrera Law Firm.

July 7, 1998 – Eli Salinas executes an affidavit purporting to present in attached time sheets the "correct charges, expenses, and hours devoted to the defense of Nelson Agustin Gonzalez."[1]

July 21, 1998 – Assistant United States Attorney Jackson writes a letter to Judge Furgeson asserting that Eli Salinas has made false claims in his affidavit justifying fees from Gonzalez. 2R14.

August 5, 1998 – Attorney Fee Hearing held regarding allegations that Mr. Salinas' affidavit contained incorrect and false information.

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[1] The Fifth Circuit's opinion noted that the affidavit "represented work done by [Petitioner] [for Gonzalez], and was reviewed by [Petitioner] before it was filed." Slip Op. at 3. The Court omitted to note that the last entry for any work done by Petitioner for Gonzalez was February 20, 1998. *See* Gov. Exh. 8.

At the conclusion of the evidence and arguments, 2R1-125, the district court took the case under advisement. On February 10, 2000, the district court issued Findings of Fact and Conclusions of Law finding Petitioner and the Herrera Law Firm guilty of Counts 1 and 2 of the information, and Salinas guilty of Counts 1, 2, 4, and 5. 1R68-99.

Petitioner's timely post-verdict motion for judgment of acquittal was denied and on April 19, 2000, the district court imposed sentence as follows:

> 1) Probation for Petitioner to run concurrently for three years for each count [and, as a "condition of probation"] . . . a fine of $15,000.00, paid to the Clerk of the United States District Clerk's Office, 200 E. Wall Street, Midland, Texas 79701, within 30 days of the judgment of sentence.[2]
>
> 2) Fine for the Herrera Law Firm of $5,000.00 to be paid to the Clerk, *supra*, within 30 days of the judgment of sentence.[3]

1R172-74; 3R28. Petitioner timely appealed.

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[2] The record reflects that the fine was timely paid, even though the district court did not specify which count the fine applied to or whether the fine was to apply to both counts.

[3] This $5,000 fine was paid by Petitioner prior to the time he paid his $15,000 fine.

REASONS FOR GRANTING THE PETITION

1. Introduction and Overview of the Questions Presented

All three questions presented are pure questions of law. The first two are important issues relating to the construction of 18 U.S.C. § 401. The first deals with whether a prosecution under § 401 can properly be based upon an alleged violation of a local rule, while the second deals with whether the statutorily authorized punishment of a fine or incarceration can be circumvented by granting probation and imposing a fine as a condition of that probation. The second issue is rendered somewhat more complex because the Fifth Circuit determined that the failure to bring this illegal sentence to the court's attention mandated review under the plain error standard contained in Rule 52, Fed.R.Crim.P. However, an illegal sentence constitutes plain error. Finally, the multiple punishment implications of sentencing Petitioner and his alter ego, the law firm of which he was the sole owner, merits attention, even in the context of plain error analysis.

2. First Question Presented

Count one alleged that Petitioner, Salinas and his law firm committed contempt by willfully disobeying a lawful order of the United States District Court by practicing law without authorization from January 12, 1998 until March 31, 1998. The Magistrate's first order denying substitution of counsel was not entered until February 26,

1998. The information thus alleged contemptuous conduct occurring prior to the Magistrate's order of February 26, 1998. Moreover, it alleged, as the manner and means of contempt, the violation of state and local rules. At the bench trial held on July 30, 1999, the prosecutor referred to the local rule as a "standing order." 2R114. It is plain to see, therefore, that the government's information envisaged the local rule and not the actual order as the underlying "order or command" giving rise to contempt. The reliance on a local rule was attacked by Petitioner on appeal from the perspective that the information was deficient and the evidence insufficient because a violation of a local rule is not a violation of an "order" or "command" of the court cognizable under 18 U.S.C. § 401(3).

The Fifth Circuit disposed of this contention by noting that the elements of the offense of contempt under § 401(3) are: a reasonably specific order; violation of that order; and the willful intent to do so, citing *Cooper v. Texaco, Inc.*, 961 F.2d 71, 72 n. 3 (5th Cir. 1992). Slip op. at 7. The Fifth Circuit also noted that the district court had found that Petitioner had violated its local rules, that a local rule is the equivalent of a standing order of the district court, and that a standing order is an order for purposes of § 401(3), citing *Jones v. Central Bank*, 161 F.3d 311, 313 (5th Cir. 1998) and *Seymour v. United States*, 373 F.2d 629, 631 (5th Cir. 1967). Slip op. at 7.

Petitioner cited numerous authorities to the Fifth Circuit that reflected that the violation of a local rule was not within the scope of 18 U.S.C. § 401(3), none of which were addressed or even acknowledged. The Fourth and Tenth Circuits hold that a mere violation of a local rule is not

violation of an "order" or "command" of the court cognizable under 18 U.S.C. § 401(3). *In re Brown*, 454 F.2d 999, 1006 (D.C. Cir. 1971); *United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984) (noting circuit split over whether "rule" in § 401(3) applies only to a rule to show cause or similar court order, or also to a standing rule or local rule of the district court). The District of Columbia Circuit has explained:

> There arises . . . the question whether a noncompliance with [the local federal district court rule regarding unauthorized practice of law] is a disobedience of a "rule" within the meaning of subdivision 3 [of § 401]. Since every other directive which the subdivision speaks of – "writ, process, order, . . . decree, or command" – is one which is specifically addressed to a particular person or group and one which traditionally has been enforceable through the contempt power, it may be that the "rule" to which subdivision 3 refers is the rule in the process sense – the rule to show cause, the rule nisi, and the like – rather than a general, standing rule of the court, which usually draws its sanctions from other sources. . . .

In re Brown, 454 F.2d at 1006 & n.33 (citing to the contrary an old Fifth Circuit case, *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967), which the Fifth Circuit relied upon in this case).

Additionally, the authority cited by the Fifth Circuit in Petitioner's case, *Jones v. Central Bank*, *supra*, was wrongly decided, as maintained by Judge Smith in his dissenting opinion. *Jones*, 161 F.3d at 313 (Smith, J., dissenting). Judge Smith noted that Rule 6(a), Federal Rules

of Civil Procedure, clearly distinguishes "local rules" and "orders" of district courts. Citing several examples, Judge Smith noted that "the Federal Rules of Civil Procedure indicate, with precision, that court orders are not the same thing as local rules. It can be no accident that this distinction appears repeatedly in the rules." *Jones*, 161 F.3d at 313.

Even assuming a local or standing rule might supply the "order" required for an offense under 18 U.S.C. § 401(3), such a rule does not provide, by itself, the basis for the offense. A finding of willful, contumacious intent requires more than the mere existence of the rule. *E.g.*, *United States v. Trudell*, 563 F.2d 889, 893 (8th Cir. 1977) (finding sufficient intent to support contempt conviction related to standing rule, where defendant attorney failed to comply with repeated, actual warnings to respect the rule) (citing *In re Brown, supra*, 454 F.2d at 1005). A defendant cannot be held in contempt absent a "definite and specific" order of which he had notice. *Brown*, 454 F.2d at 1006 & n.33; *United States v. Cutler*, 58 F.3d 825 at 834 (2nd Cir. 1995); *In re LaMarre*, 494 F.2d 753, 758 (6th Cir. 1974) (holding that the order must be clear and definite and "entered upon the record or records of the court"). The Second Circuit noted in *Cutler* that, although the contempt was based on violation of a local rule, the judge's repeated admonitions to the defendants were specific enough to fall within the contempt statute: "Here, Judge Glasser repeatedly mentioned Local Rule 7 every time he met with counsel to discuss pre-trial publicity." *Cutler*, 58 F.3d at 835 (internal citation omitted). *Cutler* and *LaMarre* teach that for an order to fall within § 401(3), it must be (1) definite and specific, (2) entered

on the record, and (3) directed personally to the alleged contemnor. A local rule or rule of professional responsibility does not meet any of these qualifications.

In contrast with the facts in *Cutler*, in the instant case, there was absolutely no judicial command, pronouncement, or suggestion directed toward Petitioner prior to February 26, 1998. Because there was no order that could be violated before that date, criminal contempt was an impossibility until the February 26 order denying substitution of counsel was issued. And since the disqualification order did not issue until March 31, any behind-the-scenes work that Petitioner might have done on Gonzalez's case could not have constituted contempt before March 31. Indeed, there is no competent evidence that Appellant did any work at all on the case after February 20, which is the date of Petitioner's last jail visit with Nelson Gonzales, as reflected in Salinas' affidavit.

The District Court, indeed, conceded that Petitioner's information did not "specifically state that [Petitioner] willfully disobeyed a[n] order, command, or 'rule.' " 1R164. It concluded, however, that the failure to allege the specific command element of the offense was cured by the reference to the statute, § 401(3), which "includes violations of rules as conduct properly punished by the Court." *Id.* (citing *United States v. Campos-Asencio*, 822 F.2d 506, 508 (5th Cir. 1987)). This contention by the district court, however, was not addressed by the Fifth Circuit, undoubtedly because the Fifth Circuit has held that "statutory citations may not stand in place of the inclusion of an element of the crime." *United States v. Cabrera-Teran*, 168 F.3d 141, 145 (5th Cir. 1999) (generally clarifying and explaining *Campos-Asencio* and other

cases). In any event, the reference to "rule" in 18 U.S.C. § 401(3) is no more a specific command directed toward Petitioner than the references to disciplinary and local rules in the text of the information. The information utterly failed to allege as to count 1 any specific command directed toward Petitioner by the court which Petitioner could have disobeyed. "No degree of liberality in interpretation, let alone any reasonable construction, allows [a finding of this] element within the [information]'s text." *Cabrera-Teran*, 168 F.3d at 147.

Count 1 failed to state an offense because it merely charged Petitioner with violating a local rule and a Texas rule. *In re Brown*, 454 F.2d at 1006; *In re LaMarre, supra*. The evidence was also insufficient for this same reason. Petitioner's conviction for contempt cannot stand merely on evidence that he represented Nelson Gonzalez prior to the conditional denial of the entry of appearance on February 26, 1998. Certiorari should be granted to consider whether the information failed to allege an offense and the evidence legally insufficient to prove a violation of § 401(3) because a violation of a local rule is not within the purview of conduct rendered illegal under 18 U.S.C. § 401(3).

Certiorari should be granted to consider the merits of this question presented.

3. Second Question Presented

18 U.S.C. § 401 clearly provides that a court can impose a fine or imprisonment, but not both. In this case, Petitioner was placed on probation for three years and

assessed a fine in the amount of $15,000, in violation of this statutory mandate.

As the record reflects, prior to sentencing, the United States Probation Department prepared a written presentence investigation report for the District Court. Therein, the probation department expressly noted that the range of punishment for this offense was up to six (6) months imprisonment or a fine of $1,000 as a Class "B" misdemeanor.[4]

On February 14, 2000, prior to sentencing, the government filed a Sentencing Memorandum. Therein, the government conceded that the disjunctive language of the statute required alternative sentencing. *See* 1R114-118 (docket sheet). Under its recommendations, the government suggested that "Defendants Salinas and Herrera each be sentenced to six months incarceration." 1R117 at para. 13. The government also suggested a fine of $15,000 to be imposed on the Herrera Law Firm (notably not on either Herrera or Salinas), *id.* at para. 14, and then stated "[b]ecause penalties under Title 18, United States Code, Section 401 are limited to either imprisonment or fine, with no other sanctions enumerated."[5]

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[4] This notation by the probation department was ignored or overlooked by the district court. Petitioner cited the presentence investigation report to the Fifth Circuit, although the Fifth Circuit totally ignored it and held that the illegality of the sentence would be reviewed under a plain error standard. Slip op. at 6.

[5] This point was also tendered to the Fifth Circuit, but it also was not mentioned in its opinion herein.

On April 19, 2000, Salinas was sentenced first and apologized to the court and Petitioner for his actions, which had embroiled an innocent man (Petitioner). Petitioner was then sentenced to three years probation and a $15,000 fine. At one point during Petitioner's sentencing, the district court stated that the fine would be a condition of probation, 3R21, but that is not what occurred. Indeed, the written judgment reflects that Petitioner was sentenced to a fine **and** probation. 2R172, 2R174 (Judgment).

After Petitioner was sentenced, his law firm – of which he was the sole owner – was sentenced to a fine of $5,000.

The appellate record reflects that on April 19, 2000, Petitioner was placed on probation. Petitioner thus began the actual service of his sentence on that date. Petitioner has been required to submit samples of his urine and report to the probation officer. His movements are under the direction and control of the United States Probation Office in Roswell, New Mexico, and he cannot travel absent express permission. His probation officer has given him the conditions of probation and he must comply with them.

The appellate record also reflects that by letter dated May 11, 2000, a cashiers check in the amount of $5,000 was sent to the Clerk of the Court for payment of the $5,000 fine imposed upon the Herrera Law Firm on April 19, 2000. Petitioner was the remitter of that check. The receipt for this payment is contained in the appellate record. Supp.R205.

Finally, the record also reflects that by letter dated May 16, 2000, a cashiers check in the amount of $15,000

was sent to the Clerk of the Court for payment of the $15,000 fine imposed upon Petitioner on April 19, 2000. The receipt for this payment is also contained in the appellate record. Supp.R205.

In a post-sentencing memorandum relating to Petitioner's probation (contained in the appellate record), Petitioner argued that the district court could not revoke his probation because the case was on appeal (even though he was serving his probation) and because Petitioner previously paid the fine that was assessed against him ($15,000.00). Petitioner asserted therein that incarceration via a motion to revoke his probation (indeed, even the imposition of probation) constituted an illegal sentence. Petitioner cited *In re Bradley*, 318 U.S. 50 (1943); *United States v. Holmes*, 822 F.2d 481 (5th Cir. 1987); *United States v. Holloway*, 991 F.2d 370 (7th Cir. 1993); *United States v. White*, 980 F.2d 1400 (9th Cir. 1993). Petitioner also pointed out that in *Bradley, supra*, this Court had held that, in light of the disjunctive statutory language ("fine or imprisonment"), once the contempt fine had been paid, the petitioner was "entitled to be freed of further restraint." *Id.* at 52-53. The district court took no action on the motion to revoke Petitioner's probation.

On appeal, Petitioner continued to press the point that his sentence was illegal. The Fifth Circuit disposed of this contention in two paragraphs. In the first paragraph, the Fifth Circuit ascertained that Rule 52(b) applied because Petitioner had not objected at the sentencing. Slip op. at 6. No mention was made of the factors outlined above that reflected that the district court was clearly on notice from the government and the probation department that the range of punishment was a fine of up to

$1,000 or six months incarceration, but not both. In the second paragraph, the Fifth Circuit noted that it had not previously determined whether a fine can be imposed as a condition of probation in a § 401 case and, in light of 18 U.S.C. § 3563(b), an error in the sentence was not "clear" or "obvious" and thus, there was no plain error. Slip op. at 6.

The penalty for criminal contempt is limited by statute to either a fine or incarceration: "A court of the United States shall have power to punish by fine **or** imprisonment, at its discretion, such contempt of its authority. . . . " 18 U.S.C. § 401. Petitioner was sentenced to a fine **and** probation. 2R172, 2R174 (Judgment) ("The defendant is hereby placed on probation for a term of three (3) years. . . . The defendant shall pay a fine of $15,000.00."). On May 18, 2000, Appellant paid the full fine of $15,000.00 to the District Clerk. Supp.R205.

This Court has previously declared in *Bradley, supra,* that, in light of the disjunctive statutory language of § 401 ("fine **or** imprisonment"), once the contempt fine has been paid, the petitioner is "entitled to be freed of further restraint." *Id.* at 52-53. The Fifth Circuit ignored these cases and instead took the position that it was not clear whether a fine could be imposed as a condition of probation under § 401 since 18 U.S.C. § 3563(b) allows conditions of probation to be imposed at the district court's discretion. Section 3563(b) does allow discretionary conditions. It sets forth twenty-one (21) specifically authorized conditions which can be imposed, none of which include the imposition of a fine. Section 3563(b) also sets forth as a twenty-second discretionary condition, a general clause which states "satisfy such other conditions as

the court may impose." However, § 3563(b) cannot overrule or supersede the statutory limitations contained within 18 U.S.C. § 401. Indeed, no case has been located where § 3563(b) has been allowed to modify the statutory range of punishment contained in the statute itself. And, prior to the sentencing in this case, the Second, Seventh, and Eleventh Circuits had rejected the argument that § 3563(b) allowed the imposition of a fine and imprisonment. *See United States v. Versglio*, 85 F.3d 942 (2nd Cir. 1996); *United States v. Holloway, supra* at 991 F.2d at 373 (7th Cir. 1993); *United States v. White, supra*. Thus, the Fifth Circuit ignored precedent from other circuits in an effort to conclude that the facially illegal sentence was not error, let alone plain error.

Additionally, it must be recalled that probation is deferred imprisonment. This Court has defined probation as "an individualized program offering a(n) . . . unhardened offender an opportunity to rehabilitate himself without institutional confinement." *Roberts v. United States*, 320 U.S. 264, 272 (1943). The issue is not whether a condition like a fine might be added to a probated sentence, but specifically whether punishment for criminal contempt under 18 U.S.C. § 401 may entail both a fine **and** a probated term of imprisonment. This Court has clearly indicated that it may not. *In re Bradley, supra. See also Penfield Co. of California v. SEC*, 330 U.S. 585, 593 (1947), in which this Court again stated that both a fine and imprisonment may not be imposed since the statute provides alternative remedies.

Furthermore, it bears noting that Petitioner also cited *United States v. Sias*, 227 F.3d 244, 246 (5th Cir. 2000), for the proposition that a sentence that exceeds the statutory

maximum is an illegal sentence and plain error, mandating review *de novo* (citing *United States v. Langford*, 196 F.3d 563 (5th Cir. 1999)). The Fifth Circuit ignored its own precedent in addition to this Court's prior pronouncements in denying Petitioner relief.

Finally, it should be recalled that prior to the November 1, 1987, amendment to Rule 35, Fed.R.Crim.P. (i.e., it was amended when the Federal Sentencing Guidelines took effect), Rule 35(a) provided that an illegal sentence could be corrected at any time. Thus, application of Rule 52(b), Fed.R.Crim.P., seems inappropriate, particularly given the realization that the district court was placed on notice of the limitations of the punishment provisions of § 401 by the government and the probation officer prior to sentencing. Certiorari should be granted to consider the merits of this question.

4. Third Question Presented

Petitioner asserted on appeal that the imposition of the $15,000.00 fine and probation against Petitioner violated the multiple punishment prong of the Double Jeopardy Clause of the Fifth Amendment because his alter ego, the Herrera Law Firm, was also assessed a $5,000 fine for the same conduct. Petitioner cited *Hudson v. United States*, 522 U.S. 93, 98-99 (1997); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); and *United States v. Woods*, 949 F.2d 175, 177 (5th Cir. 1991) (implying that punishing a defendant and his alter ego corporation would violate double jeopardy) for the proposition that this constituted multiple punishment in violation of the multiple punishment prong of the Fifth Amendment.

In one paragraph, the Fifth Circuit disposed of this contention by noting that Petitioner could not demonstrate error, much less plain error. Slip op. at 7.

Of course, the Fifth Circuit failed to appreciate that Petitioner's sentencing was concluded and he was excused before the Herrera Law Firm was sentenced. While Petitioner remained in the courtroom, his sentencing was completed. At the time he was sentenced, there was not an issue of multiple punishment. Once his alter ego was sentenced, it was not until Petitioner was forced to pay that fine that a multiple punishment violation of the Double Jeopardy Clause occurred. And since the $5,000 fine was paid before the $15,000 fine, the payment of the $15,000 fine constituted multiple punishment for the same offense.

The facts and legal issue are clear: does the multiple punishment prong of the Fifth Amendment prohibit the imposition of punishment upon an individual and his solely owned legal entity?[6] This is an important issue worthy of certiorari review.

CONCLUSION

The petition for a writ of certiorari should be granted to allow the Court to consider the merits of the questions presented.

Respectfully submitted,

DAVID L. BOTSFORD

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[6] The Herrera Law Firm was owned by Appellant. Appellant was the Herrera Law Firm's sole partner; thus, he was his Firm's "alter ego."

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-50356
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE HERRERA,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas (MO-98-CR-100-2)

(Filed March 30, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Following a bench trial, and pursuant to comprehensive findings of fact and conclusions of law, Jesse Herrera was convicted, pursuant to 18 U.S.C. § 401, on two counts of contempt of court: for aiding and abetting his associate's unauthorized practice of law (count one); and for

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

wilfully disobeying a court order by continuing to represent a client after being ordered *not* to do so (count two). For the numerous issues raised, the primary issue is whether the evidence was sufficient to support his convictions. Several of the issues presented are being raised for the first time on appeal and are, therefore, reviewed *only* for plain error. Under this narrow standard of review, there must be an error that is "clear" or "obvious", and that affects "substantial rights"; and, even then, we have discretion to correct such forfeited error only if it affects the fairness, integrity, or public reputation of judicial proceedings. *E.g.*, ***United States v. Cyprian***, 197 F.3d 736, 741 (5th Cir. 1999), *cert. denied*, 121 S. Ct. 65 (2000).

On 11 February 1998, Herrera filed a motion on behalf of the Herrera Law Firm (the Firm) to replace Chavez as counsel for Gonzalez in a federal criminal drug case (criminal case). On 24 February, the magistrate judge denied Herrera's motion pending Chavez moving to withdraw. Nevertheless, that same day, Salinas, an associate in the Firm, and who was *not* licensed to practice in federal court, filed an entry of appearance for Gonzalez.

On 2 March, Salinas and Ish Herrera, an investigator for the Firm, asked James Hershberger to assist in the criminal case as local counsel. The next day, Chavez moved to withdraw; but, the magistrate judge denied the entry of appearance by Salinas, and again denied Herrera's previous motion for substitution. The basis for the denial was concern that such representation presented a conflict of interest.

Subsequently, Gonzalez sought restitution of attorneys' fees ($10,000 retainer) he had paid the Firm. The district court ordered Hershberger and the Firm to submit affidavits supporting their fees. Salinas' affidavit contained entries representing work allegedly performed for Gonzalez in the criminal case *after* the disqualification of Salinas, Herrera, and the Firm. A hearing was held; Salinas testified: he assisted Hershberger as co-counsel; the affidavit represented work done by Herrera, and was reviewed by Herrera before it was filed; Salinas was *not* licensed in federal court; and he did *not* seek admission *pro haec vice*.

As a result, a five-count criminal information was filed against Herrera, the Firm, and Salinas. As noted, Herrera was charged with two counts of contempt of court. Following the bench trial, he was found guilty on both counts and was sentenced to concurrent terms of three years' probation for each count. As a condition of probation, Herrera was ordered to pay a fine of $15,000.

Herrera contends there was insufficient evidence to support his convictions. As to count one, he asserts there was insufficient evidence that he acted willfully or that he knew that Salinas was *not* licensed in federal court and had *not* filed a motion to practice *pro haec vice*. Regarding count two, he claims the Government failed to prove he wilfully disobeyed the order disqualifying the Firm from representing Gonzalez.

This case having been tried to the court, we review the evidence to determine whether the district court's findings are supported by substantial evidence. ***United States v. Ybarra***, 70 F.3d 362, 364 (5th Cir. 1995), *cert.*

denied, 517 U.S. 1174 (1996). The convictions will be upheld if the evidence is sufficient to justify the conclusion that Herrera was guilty beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the Government, with deference accorded reasonable inferences drawn by the district court. *Id.*

Salinas, who was *not* admitted to practice filed a notice of appearance for Gonzalez on the denying Herrera's motion for substitution was entered. Shortly thereafter, Salinas retained Hershberger to act Also, an order was filed denying Salinas' entry of appearance and Herrera's motion for substitution; and the magistrate judge testified it is standard practice for the clerk's office to notify affected parties of its orders. Further, as discussed *infra*, Salinas testified that some of the entries listed in his affidavit, which was reviewed by Herrera, represented work performed by Herrera. Hershberger's affidavit indicated that Herrera was still involved in the case as late as May 1998, long after the 2 March order denying his appearance.

Based on this evidence, it was reasonable for the district court to conclude: as both the Firm's name partner and Salinas' supervising attorney, Herrera was aware of Salinas' activities; and, by continuing to represent Gonzalez after being ordered *not* to do so, Herrera acted wilfully. In short, sufficient evidence supported Herrera's convictions.

Concerning the evidence, and Salinas' testimony at the fee hearing, a transcript of the hearing was admitted *without objection* at the bench trial. At that fee hearing, when asked whether Herrera examined the fee affidavit

before it was filed, Salinas answered: "Yes, he did. To my knowledge, yes, he did". Herrera challenges the admission at trial of Salinas' statement regarding Herrera's review of the fee affidavit; but, because Herrera *failed* to so object at trial, we review *only* for plain error. FED. R. EVID. 103; FED. R. CRIM. P. 52; *e.g.*, ***United States v. Cantu***, 167 F.3d 198, 204 (5th Cir.), *cert. denied*, 528 U.S. 818 (1999). In a bench trial, any error the district judge makes in admitting evidence is harmless if there is other admissible evidence sufficient to support the conviction. *E.g.*, United States v. Cardenas, 9 F.3d 1139, 1156 (5th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994). Even without the challenged statement, there was ample evidence to support Herrera's convictions. Accordingly, even assuming error, it was harmless. Therefore, Herrera's substantial rights were *not* affected. There was *no* plain error.

Next, Herrera asserts the district court erred by relying upon extra-record evidence to deny his post-trial motion for judgment of acquittal, or in the alternative, a new trial. The alleged extra-record facts were judicially noticed by the district court. In any event, even without these facts, there was ample evidence to support Herrera's convictions.

Herrera contends his sentence to a fine *and* probation is illegal, claiming § 401 permits a fine or imprisonment, but *not* both. Because this issue is raised for the first time on appeal, we again review *only* for plain error. FED. R. CRIM. P.. 52; *E.g.*, ***United States v. Guerrero***, 169 F.3d 933, 946 (5th Cir. 1999).

Pursuant to § 401, a district court can "punish by fine *or* imprisonment, *at its discretion*, . . . contempt of its

authority". (Emphasis added.) *See, e.g.* ***Campbell v. Keystone Aerial Surveys, Inc.***, 138 F.3d 996, 1005 n.11 (5th Cir. 1998). Our court has *not* addressed whether a fine can be imposed *as a condition of probation* in a § 401 case. In the light of 18 U.S.C. § 3563(b), any error was *not* "clear" or "obvious". *See* 18 U.S.C. § 3563(b) (allowing district court to impose conditions of probation at its discretion). Therefore, there was *no* plain error.

In addition, Herrera asserts that, as owner and sole partner of the Firm, he was the Firm's alter ego. Because the district court imposed a $5,000 fine against the Firm, Herrera contends his sentence of probation and $15,000 fine constitute double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment. Again, because Herrera did *not* raise this issue in district court, we review *only* for plain error. Herrera asserts that ***United States v. Woods***, 949 F.2d 175, 177 (5th Cir. 1991), *cert. denied*, 503 U.S. 961 (1992), *implies* that punishing a defendant and his alter ego corporation would violate double jeopardy. Because Herrera is unable to establish an error, much less a *plain* error, this claim also fails.

Herrera contends count one of the information failed to state an offense and was, thus, jurisdictionally defective. To be sufficient, an information must allege each material element of the offense. ***United States v. Cabrera-Teran***, 168 F.3d 141, 143 (5th Cir. 1999). The elements of contempt under 18 U.S.C. § 401(3) are: a reasonably specific order; violation of the order; and the willful intent to do so. ***Cooper v. Texaco, Inc.***, 961 F.2d 71, 72 n.3 (5th Cir. 1992).

The district court found that Herrera violated its local rules by aiding and abetting Salinas' unauthorized practice of law, and, thus, was guilty as to count one. Herrera's contention that a local rule is *not* an order is without merit. A local rule is the equivalent of a standing order of the district court, ***Jones v. Central Bank***, 161 F.3d 311, 313 (5th Cir. 1998); and a standing order is an order for § 401(3) purposes. ***Seymour v. United States***, 373 F.2d 629, 631 (5th Cir. 1967).

Herrera also asserts, again for the first time on appeal, that his conviction on count one should be reversed due to the variance between the charge and the evidence presented at trial. Again, we review only for plain error. A defendant's substantial rights are affected if the defendant is surprised at trial or placed in risk of double jeopardy. ***United States v. Ramirez***, 145 F.3d 345, 351 (5th Cir.), *cert. denied*, 525 U.S. 1046 (1998).

Herrera claims he was surprised at trial because he assumed count one alleged he was *not* licensed by the Western District of Texas. The record reveals otherwise. The Government filed an advisory memorandum that recited count one of the information, and identified *Salinas* as the party unauthorized to practice in federal court. A copy of the memorandum was mailed to Herrera. Because Herrera received sufficient notice of the offense alleged in count one and failed to establish a double jeopardy violation, his substantial rights were *not* violated. Again, there was *no* plain error.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50356

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JESSE HERRERA

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas, Midland

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed May 7, 2001)

(Opinion 3/30/01, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the Court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge